



The New York Times
Company

David McCraw
Senior Vice President &
Deputy General Counsel

T 212 556 4031

mccraw@nytimes.com

620 8th Avenue
New York, NY 10018
nytimes.com

August 26, 2019

VIA ECF

The Honorable Vernon S. Broderick
United States District Court
Southern District of New York
Thurgood Marshall United States Courthouse
40 Foley Square, Room 415
New York, NY 10007

Re: Gwynn X. Kinsey, Jr., v. The New York Times Company, 18-cv-12345-VSB

Dear Judge Broderick:

I am counsel for Defendant The New York Times Company (“The Times”) in the above-referenced action. I write in response to Plaintiff’s correspondence of August 26, 2019, concerning the Second Circuit’s recent decision in *Palin v. New York Times Co.*, --- F.3d ---, 2019 WL 3558545, 2019 U.S. App. LEXIS 23439 (2d Cir. Aug. 6, 2019).

First, unmentioned in Plaintiff’s letter is the fact that on August 20, 2019, The Times filed a petition for a rehearing by the panel or, alternatively, by the Second Circuit *en banc*. 17-3801, Dkt. No. 108. Among the petition’s grounds is the panel’s conflation of “reckless” conduct, as the term is used in tort law, with the concept of “reckless disregard” in the actual malice analysis. *See id.* at 7-14.

Second, while Plaintiff’s letter cites the case-specific allegations that were relied upon by the panel to find actual malice adequately pleaded in *Palin*, the relevant takeaway for this matter is the Second Circuit’s reaffirmation of the analysis set forth in The Times’s motion to dismiss – namely, that the “critical question” in the actual malice analysis is “the state of mind of those responsible for the publication,” and a plaintiff’s actual malice pleadings must satisfy “the plausibility standard” erected by the Supreme Court in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). *Palin*, 2019 U.S. App. LEXIS 23439, at *8, 24.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read 'D E McCraw', with a long horizontal stroke extending to the right.

David E. McCraw

cc: Barry Coburn (via ECF)